

THE WORLD COURT AND THE BOMB: NUREMBERG AND BABEL AT THE HAGUE

Gaillard T. Hunt

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On July 8, 1996, the World Court, the International Court of Justice at the Hague, banned the bomb.¹

This was in answer to a question certified by the United Nations General Assembly, “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”² The answer was no,

* Mr. Hunt earned an LL.B. from Columbia University in 1965. He has practiced in New York and the District of Columbia and is currently an independent researcher in Bethesda, Maryland. An earlier version of this article appeared at <http://www.gthunt.com>.

1. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Reports 226-593 (July 8) [hereinafter Nuclear Weapons]. An earlier petition from the World Health Organization was dismissed for want of standing in the petitioner. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. Reports 66-224 (July 8).

2. G.A. Res. 75K, U.N. GAOR 49th Sess., U.N. Doc. A/49/PV.90 (1994). See also 1994 U.N.Y.B., 157-58, U.N. Sales No. E.95.I.1. The resolution helped the Court out a bit by recalling “resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980, 36/92 I of 9 December 1981, 45/59 B of 4 December 1990 and 46/37 D of 6 December 1991, in which it [the General Assembly] declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity. . . .” Nuclear Weapons, *supra* note 1, at 226-28.

nuclear warfare is not permitted. The World Court has jurisdiction³ to give such answers, and even though the Court has no more battalions than the Pope or the Archbishop of Canterbury,⁴ still it is the closest thing we have to a final authority in international law, so the answer must have some importance. It is astonishing how little reaction and comment this ruling has generated.⁵

In 1998, about two years after the ruling, India and Pakistan blasted their way into the nuclear club. A massive diplomatic response is now trying to persuade them to leave peacefully.⁶ But the United States and the Russian Federation each have many times the deliverable warheads of all the other nuclear powers combined,⁷ and present plans will allow those two arsenals to continue at omniscidal and ecocidal levels into the indefinite future. India and Pakistan can excuse themselves as small contributors to the nuclear threat, negligible when compared to the United States and Russia.

Long before the Indian and Pakistani bombs, the two great nuclear arsenals were being questioned by recovering Cold Warriors with impeccable military credentials—retired CIA chief Admiral Stansfield Turner,⁸ for instance, and retired SAC commander General George Lee

3. See Nuclear Weapons, *supra* note 1, at 226, 227, 232-38 (discussing Statute of the International Court of Justice, June 25, 1945, arts. 65-68, 59 Stat. 1031, 1063-64). The Statute appears annually as an appendix in Yearbook of the United Nations. See, e.g., 1994 U.N.Y.B. 1492, 1496, U.N. Sales No. E.95.I.1, app. II.

4. Responding to criticism from the Catholic Church, Joseph Stalin replied, "The Pope! How many divisions does *he* have?" WINSTON CHURCHILL, *THE GATHERING STORM* 135 (1948) [emphasis in original].

5. But see LAURENCE BOISSON DE CHAZOURNES & PHILIPPE SANDS, *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE, AND NUCLEAR WEAPONS* (1999); JOHN BURROUGHS, *THE LEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE* (1998); HARALAMBOS ATHANASOPOULOS, *NUCLEAR DISARMAMENT IN INTERNATIONAL LAW* (2000); VED P. NANDA & DAVID KRIEGER, *NUCLEAR WEAPONS AND THE WORLD COURT* (1998).

6. U.N. SCOR, 3888th mtg., S/PRST/1998/17, 29 May 1998; S.C. Res. 1172, 3890th mtg., 6 June 1998; Eur. Parl. Doc. A4-0217/98, 19 June 1998. Many reactions to the Indian and Pakistani tests are collected on the web site for the Council for a Livable World at <http://www.clw.org> (last visited Oct. 1, 2001). See also Barbara Crossette, *Council Chides Pakistanis and Indians, Too*, N. Y. TIMES, May 30, 1998, at A5.

7. The *Bulletin of Atomic Scientists* regularly publishes nuclear scorecards. See, e.g., *U.S. Strategic Nuclear Forces, End of 1996*, BULL. OF ATOM. SCIENTISTS, Jan./Feb. 1997, at 70-71; *Russian Nuclear Forces, 2001*, BULL. OF ATOM. SCIENTISTS, May/June 2001, at 78-79.

8. STANSFIELD TURNER, *CAGING THE NUCLEAR GENIE: AN AMERICAN CHALLENGE FOR GLOBAL SECURITY* (1997); Paul Hendrickson, *Disarmed and Dangerous? Stansfield Turner Has an Explosive Idea to Reduce Nuclear Weapons*, THE WASH. POST, Oct. 7, 1997, at C1.

Butler.⁹ Their old colleagues from the deep bunkers of the Iron Mountain era were finding it necessary to circle wagons and defend MAD, overkill, and the rest of the nuclear status quo.¹⁰ The World Court's ruling shows that law has a role to play in this debate. Some of the discipline necessary to call the world back from its long flirtation with extinction may come from legal reasoning, and may even come from one of the law's most disparaged departments, international law.

Therefore, let us examine the World Court's ruling. The lack of reaction and comment about the ruling may be largely the Court's own fault. The ruling consists of a formal *dispositif*,¹¹ which seems to say there may be exceptions to the bomb's illegality; a rambling and diffuse "Advisory Opinion" by the whole Court,¹² which offers little usable analysis of the issues; and fourteen separate opinions, one from each judge, no two concurring with one another.¹³ Most of the discussion is hopelessly abstract. As a political rallying point the ruling is unpromising. Clashing viewpoints and differing legal traditions from around the world, which could make the World Court an intellectual clearinghouse for the best hopes of humankind, came together, and a decision was reached to condemn the bomb. But the aspirations of Nuremberg were drowned by the confusions of Babel.

I. THE COURT HOLDS NUCLEAR WEAPONS SUBJECT TO LAW

Let us start with the World Court's formal *dispositif*. It has two sections. In section 1, the Court, by a vote of thirteen to one, accepted jurisdiction and agreed to issue an advisory opinion. In section 2, the Court held:

9. JONATHAN SCHELL, *THE GIFT OF TIME: THE CASE FOR ABOLISHING NUCLEAR WEAPONS NOW* (1998) (assembling a variety of anti-nuclear views). See also George Lee Butler, *Time to End the Age of Nukes*, BULL. OF ATOM. SCIENTISTS, Mar./Apr., 1997, at 33-36; General Andrew Goodpaster, *An Evolving U.S. Nuclear Posture*, BULL. OF ATOM. SCIENTISTS, Mar./Apr., 1996, at 52-55; George Lee Butler, *The General's Bombshell: What Happened When I Called for Phasing Out the U.S. Nuclear Arsenal*, THE WASH. POST, Jan. 12, 1997 at C1. See also the proposals of Bruce Blair and the former chair of the Senate Armed Services Committee, Senator Sam Nunn, in *From Nuclear Deterrence to Mutual Safety; As Russia's Arsenal Crumbles, It's Time to Act*, THE WASH. POST, June 22, 1997, at C1.

10. Several are quoted in Hendrickson, *supra* note 8.

11. Nuclear Weapons, *supra* note 1, at 265-67.

12. *Id.* at 227-65.

13. All fourteen can be found in Nuclear Weapons, *supra* note 1, at 268-593. Nine of them are also published in 35 I.L.M. 809, 832-938. The other five can be found in 35 I.L.M. 1343, 1343-58.

[(2)]A. Unanimously, There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

[(2)]B. By eleven votes to three, There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

[(2)]C. Unanimously, A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

[(2)]D. Unanimously, A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

[(2)]E. By seven votes to seven, by the President's casting vote, It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.

[(2)]F. Unanimously, There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.¹⁴

14. Nuclear Weapons, *supra* note 1, at 266-67 (judges' votes omitted).

Paragraph (2)A says there is no specific authorization for nuclear weapons. This states the obvious, but it is far from trivial. If the nuclear powers' reservations of their rights had been as successful as they claim, surely there would be some specific authorization somewhere. This paragraph makes clear that Hiroshima and Nagasaki are not precedents amounting to such a specific authorization.

Paragraph (2)B says there is no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such." Language so loaded with qualification cries out for explanation. It is heavy with what logicians call negatives pregnant. Two of the three judges who voted against this paragraph—the three were Christopher G. Weeramantry of Sri Lanka, Mohamed Shahabuddeen of Guyana, and Abdul G. Koroma of Sierra Leone—cited the 1925 Geneva Gas Protocol as such a prohibition.¹⁵ The Court did not go along with this, so we must accept that the bold proposition that the bomb is illegal as a poisonous gas did not survive the Court's strict constructionism. One of the three judges, however, pointed to the negatives pregnant and claimed that the Court did not really deny the possibility of some nuclear prohibition: "The specificity conveyed by the words 'as such' enables me to recognize that '[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.'"¹⁶ Nevertheless, he voted against the paragraph, he said, because "the words 'as such' do not outweigh a general suggestion that there is no prohibition at all of the use of nuclear weapons."¹⁷ Both the nuclearists and the anti-nuclearists on the Court indulged in much of this kind of hair-splitting.

In any event, it was a "comprehensive and universal"—strong words—"as such" prohibition that paragraph (2)B rejected eleven to three. This rejection is trivial and meaningless as applied to customary law, which is not written down and therefore cannot prohibit anything "as such" (that is, by name, explicitly), and it is only a statement of regrettable but undeniable fact as applied to treaty law as it now stands, because the all-important Nuclear Non-Proliferation Treaty (below) prohibits possession, not use, or it prohibits use only by implication. There is less to paragraph (2)B than meets the eye.

15. See *Nuclear Weapons*, *supra* note 1, at 429, 433 (Opinion of Weeramantry); *id.* at 429, 508-12 (referencing the 1925 Geneva Gas Protocol); *id.* at 556, 580 (Opinion of Koroma) (citing Article 23(a) of the Hague Convention of 1899 and 1907 as well as the Geneva Gas protocol of 1925). The third objecting judge cited the 1925 Geneva Gas Protocol in support of a general principle against weapons that cause unnecessary suffering. *Nuclear Weapons*, *supra* note 1, at 375, 403 (Opinion of Shahabuddeen).

16. *Nuclear Weapons*, *supra* note 1, at 375, 377 (Opinion of Shahabuddeen).

17. *Id.*

The unanimous holdings of the next two paragraphs, (2)C and (2)D, take away in practice more than paragraph (2)B allowed in theory. In these next paragraphs, the Court finds nuclear weapons firmly under the moderating hand of international law. The Opinion of the Court notes the general acceptance by the nuclear States that any use of nuclear weapons is "indeed restricted by the principles and rules of international law, more particularly humanitarian law" ¹⁸ "A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter," ¹⁹ i.e., self-defense, and even self-defense is subject to the rules of necessity and proportionality. ²⁰ Any use of nuclear weapons must take account not only of the effects of the immediate use but also of the retaliatory use it is likely to engender. ²¹ It follows that any conceivable use of nuclear weapons would be illegal. All the negatives pregnant in paragraph (2)B are indeed gravid with significance. There are customary prohibitions against nuclear weapons, even if they are not, to the Continental legalist, entirely "comprehensive" and "universal" and against nuclear weapons "as such."

II. THE COURT CONDEMNS NUCLEAR WEAPONS "GENERALLY"

If the *dispositif* stopped there, anti-nuclearism would be far ahead. But there is the exasperating puzzle of paragraph (2)E.

A majority of the Court felt there must be some limit on its condemnation of nuclear weapons, or at least on the expression of it. Paragraph 95 of the Opinion says:

In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements [the principles and rules of law applicable in armed conflict]. Nevertheless, the Court considers that it does not have sufficient elements to enable

18. See Nuclear Weapons, *supra* note 1, at 239, 260, which quotes the submissions of several nuclear States: "Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons." (Russian Federation, CR 95/29, p. 52); "So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *ius in bello*." (United Kingdom, CR 95/34, p. 45); and "The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons—just as it governs the use of conventional weapons." (United States of America, CR 95/34, p. 85)." *Id.* at 227, 260.

19. *Id.* at 227, 245 ¶ 39.

20. *Id.* at 227, 245 ¶¶ 41-44.

21. *Id.* at 227, 245 ¶ 43.

it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.²²

Most jurists, moralists, and logicians would accept this as a hand-wringing confession of the inevitable limits of human wisdom and language. But when the same thought appears in paragraph (2)E of the *dispositif*, it has become linked to “an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”²³ Would this mean that the Japanese could have legally used the bomb against America, had they had it in 1945?²⁴ Or that Hitler could have put nuclear warheads in his V-2s?²⁵ This would be an alarming concession, but the Court does not say nuclear weapons would be legal in such cases. The Court refuses to rule one way or the other.

The Court has been keeping the discussion on the level of abstract rules and principles, and avoiding concrete situations, real or hypothetical. Some of the judges seem to have in mind an all-out nuclear exchange, while others may be speculating about limited battlefield uses of tactical warheads under special and well-controlled circumstances, while still others struggle for a formula that would cover all conceivable scenarios with the phrase “nuclear weapons” in them. This may be inevitable in an advisory opinion, which does not give a court the pragmatic benefit of a factual situation. But here at the eleventh hour, one hypothetical—and a hypothetical hypothetical at that—is sneaked in and given prominent place. We could use more discussion of hypotheticals, or we could do without this one.

The individual opinions put all this in a better light. Four²⁶ of the seven²⁷ judges who voted for paragraph (2)E said explicitly that they

22. *Id.* at 227, 262-63.

23. Nuclear Weapons, *supra* note 1, at 227, 266.

24. Both *id.* at 556, 561 (Opinion of Koroma) and *id.* at 375, 419 n. 33 (Opinion of Shahabuddeen) point out that this idea of an unlimited right to defend the State was rejected at Nuremberg.

25. Robert Musil, of Physicians for Social Responsibility, has suggested (orally, in a class) that the great powers might have taken a more negative attitude toward nuclear weapons and might have avoided the nuclear arms race entirely if they had first encountered the atomic bomb as an Axis weapon used against London or San Francisco.

26. Nuclear Weapons, *supra* note 1, at 556-82 (Opinion of Koroma); *id.* at 330-74 (Opinion of Oda); *id.* at 375, 376 (Opinion of Shahabuddeen: “My difficulty is with the second part [of (2)E]”); *id.* at 429, 433 (Opinion of Weeramantry: “My considered opinion is that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever” [emphasis in original]).

objected only to the limits on the condemnation of nuclear weapons, and that they thought the condemnation should have been absolute. Only one of the dissenting seven, Judge Schwebel, candidly argued for the legality of the bomb.²⁸ (This leaves two who were ambiguous or unclear, Guillaume²⁹ and Higgins.³⁰) Of the seven³¹ who voted for the paragraph, not one of them expressly said he would have voted against it had it been stronger and had the condemnation been without limits.³² No matter how the limitations got in there, we have both a clear statement that most uses of the bomb would be illegal and a possible majority of judges believing that any use would always be illegal.

III. THE NON-PROLIFERATION TREATY BANS POSSESSION

Whatever the cautionary negatives in the first several paragraphs of the *dispositif*, the tone changes in the final paragraph, (2)F. The Court lays down the law and spells out a clear and unequivocal obligation for future action: The nuclear signatories of the Non-Proliferation Treaty must give up their nuclear weapons. The negotiations leading to that treaty resulted in a bargain between the nuclear States and the non-nuclear States, with the nuclear States agreeing to Article VI: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."³³

27. Guillaume, Higgins, Koroma, Oda, Schwebel, Shahabuddeen, and Weeramantry. *Id.* at 266.

28. Nuclear Weapons, *supra* note 1, at 311-29 (Opinion of Schwebel).

29. *Id.* at 287-93 (Opinion of Guillaume).

30. *Id.* at 583-93 (Opinion of Higgins).

31. *Id.* at 266. The judges are Bedjaoui, Ferrari Bravo, Fleischhauer, Herczegh, Ranjeva, Shi, and Vereshchetin.

32. Indeed, Ranjeva said, "[I]f the two clauses of paragraph 2 E had appeared as separate paragraphs, I would have voted without hesitation in favour of the first clause and, if the provisions of the Statute and Rules of the Court so allowed, I would have abstained on the second clause" Nuclear Weapons, *supra* note 1, at 294, 304 (Opinion of Ranjeva). Herczegh said he believed "the wording of this sentence [the reservation of judgment about nuclear weapons in extreme circumstances of self-defense] cannot easily be reconciled with the earlier reference to 'all the requirements' of Article 51 of the Charter." *Id.* at 275, 276 (Opinion of Herczegh). But, on the other hand, Fleischhauer said there was no ground to hold the law of humanity and the immunity of neutrals superior to the right of self-defense. *Id.* at 305-310 (Opinion of Fleischhauer). Vereshchetin said an absolute prohibition would require a treaty. *Id.* at 279-81 (Declaration of Vereshchetin).

33. Nuclear Weapons, *supra* note 1, at 227, 263 (quoting Nuclear Non-Proliferation Treaty, 21 UST 483; TIAS 6839; 729 UNTS 161, Article VI).

The last paragraph of the *dispositif*, (2)F, holds the signatory nuclear States to this agreement. It unanimously decrees that these nuclear powers are obliged to negotiate complete nuclear disarmament. Paragraph 99 of the Opinion of the Court amplifies this:

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.³⁴

The Court went on to support this voluntarily incurred treaty obligation, this promise made by each nuclear power to all the other States signing the Non-Proliferation Treaty, by citing General Assembly resolutions from the very first³⁵ onward,³⁶ and the statements of the 1995 NPT review conference.³⁷ Thus, the Court squarely rejected the notion that the post-Cold War world order might include the United States and the Russian Federation bristling with thousands of nuclear weapons each.

IV. NATIONS OUTSIDE THE NON-PROLIFERATION TREATY

When the Court discusses possession, it takes the course of least resistance and most certainty by leaving unwritten law behind and focusing on the Non-Proliferation Treaty. Little did anyone know how dramatically attention would shift two years later to nations outside the Treaty, when two of them, India and Pakistan, would write in subterranean fire the questions the Court neglected to answer: Is it lawful under international law, outside of the Non-Proliferation Treaty, for a nation to arm itself with a nuclear weapon? Is it lawful even if the nation in question has a traditional enemy that is sure to respond by similarly arming itself? Is it lawful to start or join a nuclear arms race?

34. *Id.* at 227, 263-64.

35. Literally the first: Resolution 1(I), of 24 January 1946. Ferrari Bravo stressed the importance of this resolution, citing, "*The United Nations in World Affairs, 1945-1947, 1947*, pp. 391 *et seq.*" Nuclear Weapons, at 282, 283 (Declaration of Ferrari Bravo). See also G.A. Res. 1946-47 U.N.Y.B. 64-66, U.N. Sales No. 1947.I.18.

36. See, e.g., G.A. Res. 808 A (IX), U.N. Doc. A/2779 (1954); 1954 U.N.Y.B. 20-21, U.N. Sales No. 1955.I.25. See note 2, *supra*, for others.

37. Nuclear Weapons, *supra* note 1, at 227, 265 (citing "the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995," as well as the Security Council resolution before the review conference, S/RES/984 (1995), Apr. 11, 1995).

The arguments against the lawfulness of any nation, even one outside the Treaty, acquiring a nuclear weapon are many. Acquiring a nuclear weapon, especially when one's adversaries are likely to acquire it too, is a threat to international peace and security. So the UN Security Council said through its president in 1992: "The proliferation of all weapons of mass destruction constitutes a threat to international peace and security"³⁸ If use of nuclear weapons is a crime against humanity, then preparation for use must be at least an inchoate illegality. And when a treaty commands as much acceptance as has the Non-Proliferation Treaty,³⁹ it may be declaratory of the *jus cogens*, the general principles binding on all.⁴⁰ Perhaps a nation gains nothing by holding back its signature. We can assume that all these arguments are being made to India and Pakistan—and to Israel as well, one hopes. But the World Court did not explicitly address the question of nations outside the Nuclear Non-Proliferation Treaty.

V. THE JUDGES' SEPARATE OPINIONS

The fourteen separate opinions, one from each member of the Court, suggest by their very bulk that the *dispositif* and its limitations may not have been the optimum set of compromises. It is too much to expect that fourteen judges using different languages and grounded in differing legal traditions might sharpen issues as effectively as, for instance, the nine members of the United States Supreme Court sometimes do. But we cannot help but wish that their output might have been both shorter and clearer.

38. Statement of the President of the Security Council, 1992 U.N.Y.B. at 33, 35, U.N. Sales No. E.93.I.1.

39. Only India, Pakistan, and Israel have not signed the treaty and have bombs or the makings of bombs. Cuba and a handful of other small States have not signed: e.g., Cook Islands and Niue. Brazil, Chile, and Argentina have recently come on board. The dreaded "rogue States"—Libya, Iraq, Iran, North Korea—have all signed, as have all of the large nuclear powers: America, Britain, and Russia from the beginning, and China and France since 1992. The nations resulting from the breakup of the Soviet Union have all signed. They have all become non-nuclear except the Russian Federation. Treaties in Force, 2000, 434. Not since the founding of the United Nations Organization has any proposal for international good behavior won such wide acceptance.

40. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993). *But see* Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (Fall 1990); Adam Steinfield, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 BROOK. L. REV. 1635 (Winter 1996).

A. *The Anti-Nuclearists*

Three of the separate opinions, long as they are, make good reading for the anti-nuclearist: Christopher G. Weeramantry of Sri Lanka covered 126 pages (about 50,000 words) with arguments against the bomb;⁴¹ Mohamed Shahabuddeen of Guyana fifty-three pages (about 20,000 words);⁴² and Abdul G. Koroma of Sierra Leone, twenty-six pages (about 10,000 words).⁴³

Koroma was one of the judges mentioned above who voted against paragraph (2)C because they believed that the gas protocols and other conventions do ban nuclear weapons "as such." He voted against paragraph (2)E because he read the Nuremberg tribunal as saying a State's right to ensure its own survival is not unlimited,⁴⁴ and the ICJ's own *Nicaragua* case likewise.⁴⁵ He found the fifty-year tradition of non-use amply backed by an *opinio juris* against the bomb, making it binding law.⁴⁶ In one of the few references⁴⁷ to Hiroshima and Nagasaki by any member of the Court, Koroma said: "It should not be forgotten that the Second World War had witnessed the use of the atomic weapon in Hiroshima and Nagasaki, resulting in the deaths of thousands of human beings. The Second World War therefore came to be regarded as the period epitomizing gross violations of human rights."⁴⁸

Koroma dismissed the distinction between treaty law, admittedly binding, and humanitarian customary law, which the United States and

41. Nuclear Weapons, *supra* note 1, at 429-555 (Opinion of Weeramantry).

42. *Id.* at 375-428 (Opinion of Shahabuddeen).

43. *Id.* at 556-82 (Opinion of Koroma).

44. *Id.* at 556, 561 (Opinion of Koroma) (citing THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, vol. 1 at 208).

45. Nuclear Weapons, *supra* note 1, at 556, 561 (Opinion of Koroma) (citing *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. REP. 14, 94).

46. *Id.* at 556, 578-79 (Opinion of Koroma).

47. Shahabuddeen quoted a Red Cross reaction to Hiroshima and Nagasaki and cited to the Tokyo District Court ruling condemning those uricides: *Shimodo v. The State*, 8 JAPANESE ANN. OF INT'L L. 212, 235 (1964). Nuclear Weapons, *supra* note 1, at 375, 383, 397 (Opinion of Shahabuddeen). Weeramantry argued those bombings did not show that modern nuclear war would be survivable because, for one thing, they did not involve the modern risk of escalation. *Id.* at 429, 473-75 (Opinion of Weeramantry). Other references to the Japanese cities were perfunctory or dealt only with the destruction and injury done there. For a summary of the statements of the mayors of Hiroshima and Nagasaki, see *id.* at 556, 567-69 (Opinion of Koroma).

48. Nuclear Weapons, *supra* note 1, at 556, 577 (Opinion of Koroma).

others had urged the Court to leave to political consideration.⁴⁹ He cited several authorities rejecting such a double standard and holding that the humanitarian side of customary law is part of the *jus cogens* binding on all.⁵⁰

Weeramantry and Shahabuddeen were as anti-nuclear as Koroma, and wrote at greater length. The idea that nuclear weapons are essentially a gas and are prohibited by the anti-gas protocols⁵¹ was rejected by the majority of the Court, but many of their other points remain arguable law.

B. The Candid Nuclearist

The only unabashed apologist for the bomb was the American, Judge Harold Schwebel, Vice President of the Court. Schwebel served for many years in the office of the Legal Advisor in the United States State Department. His opinion begins, "More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle."⁵²

He claims that for a half-century, the threat to use nuclear weapons has been clear and constant from the major States, States "that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population."⁵³ But we know the vast majority of States do not possess nuclear weapons, and those that possess them seldom or never make threats, even implicitly, and have not used a nuclear weapon since 1945. This more accurate view of State practice would take some of the titanic out of Judge Schwebel's tension between practice and principle.

Schwebel takes similar liberties by enlisting the treaty regimes of the last half-century on the pro-nuclear side of his tension. All the limited nuclear bans, such as the Non-Proliferation Treaty, legitimize that which they do not ban, he argues.⁵⁴ He carries this to the extreme of reading the assurances of non-use the nuclear powers gave to the non-aligned, non-nuclear signatories of the Non-Proliferation Treaty as implying the threat to use nuclear weapons elsewhere.⁵⁵ As for the anti-nuclear General

49. *Id.* Written Statement of the Government of the United States of America, June 20, 1995. Unpublished. Source on file with author.

50. *Id.* at 556, 572-74 (Opinion of Koroma).

51. *Id.* at 429, 433 (Opinion of Weeramantry). See *supra* note 15.

52. *Id.* at 311 (Opinion of Schwebel).

53. Nuclear Weapons, *supra* note 1, at 311, 312 (Opinion of Schwebel).

54. *Id.* at 311, 315-17. (Opinion of Schwebel). Many nations have said explicitly when supporting these limited bans that they do not mean to validate bombs outside of the ban.

55. Nuclear Weapons, *supra* note 1, at 311, 315-17 (Opinion of Schwebel).

Assembly resolutions, Schwebel requires that such resolutions be "adopted unanimously (or virtually so, qualitatively as well as quantitatively) or by consensus . . ." before they become evidence of the world's *opinio juris*.⁵⁶ Thus he claims that the resolutions passed by mere majorities serve only to show that the law is the opposite of what they say.

Schwebel accepts the concessions of the nuclear powers that any nuclear use is subject to the humanitarian principles of law.⁵⁷ Those principles are what make up the anti-nuclear side of his tension. He agrees there is a problem in the deterrence theory of the nuclear States: It rests on a professed willingness to incinerate millions of civilians with no conceivable proportionality to any legitimate military objective, and such behavior is against generally accepted principles of humanitarian law. Faced with this contradiction, Schwebel comes close to concurring with the Court's anti-nuclear ruling: "The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law."⁵⁸

Further to his credit, Schwebel puts forth a hypothetical. What if a rogue submarine were destroying cities and killing and threatening to kill millions? Ordinary depth charges are powerless against it. Would it be illegal to hit it with a nuclear depth charge, a clean nuclear explosion that would save the threatened cities with no collateral damage, fallout, or risk of escalation?

We asked for hypotheticals, so it is only fair that we give our enthusiastic endorsement to this virtuous nuclear explosion. It sounds as wholesome as a nuclear bomb vaporizing a giant meteor headed toward the earth,⁵⁹ and about as likely. In the post-nuclear world, there will be no submarines capable of killing millions, and the greater safety lies in seeing that such incapacity comes about as soon as possible.⁶⁰ A legal rule should

56. *Id.* at 311, 319.

57. *Id.* at 311.

58. *Id.* at 311, 321.

59. Timothy Ferris, *Annals of Space: Is This the End?*, THE NEW YORKER, Jan. 27, 1997 at 44, 53-55 (discussing Edward Teller's proposals to prepare for just such a contingency).

60. Likewise for nuclear terrorism, where nuclear weapons in the hands of national authorities would be of little value anyhow. Whatever the virtue or necessity of some residual nuclear capability remaining with some authority, we are so far from that level of disarmament that it is dishonest to talk about it. The present issue when we talk about law and rules is this: Can the general rule against nuclear weapons *per se* be destroyed by improbable thought-experiments or does the general ban, with its authorization to keep nuclear weapons away from terrorists and rogue nations, stand as a general ban, whatever the limitations and defeasibility of all verbal rules?

condemn a source of danger, not condone it in the hope that it might possibly in some extraordinary case serve as a homeopathic antidote to itself. Schwebel's interest in this hypothetical reflects the same view as the United States' filing with the Court:⁶¹ the view that the Court should not attempt to synthesize a verbal rule unless a treaty has led the way and supplied the rule, and that any rule as verbalized must be indefeasible by any conceivable set of circumstances. There is some authority for this kind of judicial restraint in the healthy maxim *nulla poena sine lege* (no punishment without a law), but as far as major crimes against humanity are concerned, it was conclusively rejected at Nuremberg.

The underlying problem with Schwebel's approach is his allocation of burdens of legal persuasion. If he encounters a divided view on any nuclear issue, it is nuclearism that prevails, and restraint must bear the risk of non-persuasion. He rests this on the adage that that which is not prohibited is allowed—a sound principle, but one that does not apply to mass destruction. With mass destruction, that which is not specifically and affirmatively justified, and brought within some extraordinary license, is illicit—because mass destruction is generally illicit. Schwebel's approach is well-illustrated by some speculations about the 1991 Gulf War that take up the final pages of his opinion. Tariq Aziz, the Iraqi Foreign Minister, has claimed that Iraq had been ready to use chemical and biological warfare but was deterred by the veiled nuclear threats of United States Secretary of State James Baker.⁶² Schwebel offers this as an instance of the bomb having a healthy effect. His logic here is the eternal logic of bellicism: The bomb gets credit for deterring everything the Iraqis did not do, however speculative their ability to do it, but need accept no embarrassment for what they actually did do, in defiance of the same deterrent.

But putting aside this fundamentally misplaced presumption of regularity, Schwebel's opinion presents issues at the crux of this case:

- 1) How are the opinions of nations to be weighed? Do the great powers outweigh the rest of the world in determining legal consensus? Or are all foreign offices created equal? Or does the truth lie between these extremes?
- 2) To what extent should any official or any commentator, including the International Court of Justice, limit its discussion of international

61. Nuclear Weapons, *supra* note 1. Written Statement of the Government of the United States of America, June 20, 1995. Unpublished. Source on file with author.

62. Much skepticism has greeted Aziz's story. See William M. Arkin, 52 BULL. OF THE ATOM. SCIENTISTS 64, (May/June 1996).

law to written treaties, and dismiss the opinion of humanity because it is diffuse and ill-defined?

3) Do the unwritten principles of humanitarian law ever ban a particular weapon, or must those principles always address only the results accomplished?

The first question will disappear if and when the United States and the other nuclear powers cease opposing the rest of the world on the legality of nuclear arms. The Court's ruling answers the second question for the International Court of Justice at the Hague: The unwritten law of humanitarian restraint is as real there as it was at Nuremberg a half-century ago.⁶³ The third question remains as the last-ditch defense of nuclearism: Maybe we can't use our nuclear weapons and maybe we are obliged to get rid of them, but just don't say that they are illegal *per se*. The nuclearists' world may end not with a bang but a quibble.

We can be grateful to Schwebel for his clarity and candor. He voted against paragraph (2)E because he saw no general illegality in the use of nuclear weapons, and a clear majority of the Court voted down that theory.

VI. THE LAW AS IT NOW STANDS

Our review of the World Court's work has perhaps smacked of ingratitude. The International Court of Justice is the closest we have to a final authority in international law (even if it is not one, because nations reserve the right to ignore its opinions). When such an authority condemns the bomb, it seems ungrateful to complain of obscurity or lack of clarity. The World Court accomplished much. Because of its efforts we can now declare large areas of law settled. Let us try to outline the law as it now stands. First, some obvious distinctions:

1) Categories of nuclear acts: research, development, acquisition, stockpiling, deployment, threatening to use, and the actual use of nuclear weapons.

2) Categories of use: peaceful explosions, testing, and the possible combat uses, all of which have been hypothetical since 1945: tactical use in controllable situations, limited escalations, counterforce escalations, countervalue escalations, uricide, genocide, omnicide, ecocide, etc.

3) Sources of law: customs joined with an *opinio juris*, including the basic humanitarian laws of war; treaty regimes, also confusingly called conventional law; and fully implemented rules acknowledged

63. Nuclear Weapons, *supra* note 1, at 265.

by States and conveyed to their officials by laws, orders, and regulations.

4) Criteria of legality: rules that forbid a given weapon *per se*, and rules that forbid certain weapons because of the unlikelihood that they can be used legally; rules that forbid a weapon by name, and rules that denounce it by description.

With all of this factual and conceptual variety, and with the general lack of institutional settlement in international law, there is much we cannot say with authority. But if we focus on the use of nuclear weapons, we find three points that are now generally accepted by nuclear and non-nuclear States alike:

1) Any military use of nuclear weapons is subject to the unwritten principles of humanitarian law, the law referred to in the Martens clause.⁶⁴

2) These principles ban the targeting of civilians.⁶⁵

3) They require economy and proportionality even when the targets are military.⁶⁶

4) While the nuclear powers accept these points, they seem to have trouble with what obviously follows: that any nuclear exchange would be against international law⁶⁷ as well as violating every other standard of human conduct. So would any nuclear bombing of any city.⁶⁸ Only the most unlikely hypothetical use—against Schwebel's rogue submarine, for instance—could avoid collateral consequences of escalation and fallout enough to escape a ringing condemnation by "the requirements of the public conscience." Even the smallest of "tactical" nuclear artillery would bring down on the nation or group using it the odium of humankind for crossing the nuclear threshold.⁶⁹

64. *Id.* at 227, 266. The Martens clause says that, unless otherwise provided, "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." *See, e.g.*, Hague Convention II of 1899, Convention with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1805. *See also* 3 ENCYCLOPEDIA OF PUB. INT'L L.: MARTENS' CLAUSE 326-27 (1997). A more recent form of the Martens clause is quoted at Nuclear Weapons, *supra* note 1, at 227, 257.

65. Nuclear Weapons, *supra* note 1, at 227, 257, 266.

66. *Id.* at 227, 245 (Opinion of the Court).

67. *Id.* at 227, 266.

68. *Id.*

69. *Id.* at 227, 245 (Opinion of the Court).

Thus the half-century of non-use is not a legal irrelevancy. It has given rise to law as clear as any written on paper and signed at conference tables, and breaking it would cost any nation or group dearly. Counselors who try to define this law out of existence will regret their words, should anyone ever be foolish enough to act upon their advice.

VII. WHITHER NOW?

Apart from all the considerations discussed above, humanitarian law as well as treaty law should have something to say about the sheer mass of the two largest nuclear arsenals, even after their post-Cold War reductions, because no conceivable military or political threat can justify the risks of omnicide and ecocide involved. There are several distinct principles at work here: Any acquisition of a nuclear bomb is destabilizing and a threat and should be denounced as illegally aggressive under the Charter,⁷⁰ in addition to its illegality under the Non-Proliferation Treaty. But quite separate from this, and antecedent to even the simplest attempts at forming international law, when a nuclear arsenal reaches the size that it becomes a threat to the life of the planet itself as well as a threat to the peace, it must acquire yet another dimension of illegality. None of this is covered in the Court's opinion.

The Russian Federation and NATO have switched places since the days of John Foster Dulles, but still the weaker side sees its nuclear weapons as a cheap substitute for the prohibitively expensive buildup it would need to reach a balance of conventional forces. This was American doctrine under Truman and Eisenhower, when faced with the massive Red Army sprawled over half of Europe,⁷¹ and it is the doctrine of the Russians now, faced with NATO expanding into former Soviet satellites. It would dramatically enhance the American margin of power if the nuclear weapons were out of the order of battle.

On most of the above legal questions, the United States professes doctrines different from the rest of the world. That is the chief source of legal obscurity. Judge Schwebel and others find benefit in this obscurity. This is the crux of this matter: Which is safer, a world professing the illegality of nuclear weapons and seeking to suppress them by that illegality, or a world professing their legitimacy and hoping to hold them in check by their own dangerous effects, such as nuclear diplomacy and

70. Statement of the President of the Security Council, 1992 U.N.Y.B. 33, 35.

71. Bernard Baruch to John Foster Dulles, Oct. 5, 1948: "The only thing that stands in the way of the over-running of Europe today is the atom bomb. When once we outlaw that, there is nothing to stop the Russian advance." UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1948 448, 450 (Vol. 1, Part I, 1975).

nuclear terror? Because the issue is not capable of experimental resolution, the answer must turn on presumptions and judgment. When it comes to the omniscidal arsenals now in place, and to the proposed retention of enough of those arsenals for multiple genocides, the world must vote down Judge Schwebel, his former colleagues in the Department of State, and those of like mind in the Russian Federation.

Somewhere, sometime, there may have been a State that refrained from an evil act because its legal advisors could not say nuclear retribution against it would be illegal. It seems unlikely. But we know for sure that States such as India and Pakistan rely on the legal arguments of the nuclear States when they claim the right to become nuclear. So we must seize the chance the World Court has given us to rectify the legal confusion left over from the 1940s and 1950s, and declare to, and for, all the planet that the United States accepts the rule that no one may lawfully use a nuclear weapon. Then we must give the Russian Federation the assurances it needs so that all the nuclear powers may carry out the promise of Article VI and rid the world of their nuclear weapons. If we let the present window of relative opportunity pass, and if the Russian Federation is left with its thousands of warheads—unstable, but cocked and ready to go—we will deserve the curses of our descendants, if we have any.